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Supreme Court, U.S.

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In the
Supreme Court of the United States

OCTOBER TERM, 1977

GLADSTONE, REALTORS,® et al.,

Petitioners,

vs.

VILLAGE OF BELLWOOD, et al.,

Respondents.

ROBERT A. HINTZE, REALTORS,® et al.,

Petitioners,

vs.

VILLAGE OF BELLWOOD, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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Petitioners Gladstone, Realtors,[®] James D. Doehring, Robert J. Casey, Ted Wolnik, Beverly Ricchuto, William Jakes, Carol Hosnedl, Robert A. Hintze, Realtors,[®] R. J. Tiliman, Stephen F. Eggerding, and Robert A. Hintze respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in these proceedings on January 25, 1978.

Opinions Below

The opinion of the Court of Appeals, which is reported at 569 F.2d 1013 (7th Cir. 1978), appears in the Appendix hereto. *Appendix 9-21*. The opinions rendered by the United States District Court for the Northern District of Illinois, which are unreported, are also contained in the Appendix hereto. *Appendix 1-8*.

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 25, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to Section 1254(1) of Title 28, United States Code.

Question Presented

Whether natural persons and municipalities, who are not direct victims of discrimination in the sale of housing, have any right under Article III of the United States Constitution and Sections 1982, 3604 and 3612 of Title 42, United States Code, to bring suit against real estate brokers whom they allege to have engaged in racial steering, on the theory that racial steering interferes with such persons' generalized interest in living in an integrated society.

Constitutional And Statutory Provisions Involved

United States Constitution, Article III, Section 2, Clause 1:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the

United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Code, Title 42:

§ 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

§ 3604. Discrimination in sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

§ 3610. Enforcement

Person aggrieved; complaint; copy; investigation; informal proceedings; violations of secrecy; penalties

(a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary. Complaints shall be in writing and shall contain such information and be in such form as the Secretary requires. Upon receipt of such a complaint the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c) of this section, the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. Nothing said or done in the course of such informal endeavors may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned. Any employee of the Secretary who shall

make public any information in violation of this provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or imprisoned not more than one year.

Complaint; limitations; answer; amendments; verification

(b) A complaint under subsection (a) of this section shall be filed within one hundred and eighty days after the alleged discriminatory housing practice occurred. Complaints shall be in writing and shall state the facts upon which the allegations of a discriminatory housing practice are based. Complaints may be reasonably and fairly amended at any time. A respondent may file an answer to the complaint against him and with the leave of the Secretary, which shall be granted whenever it would be reasonable and fair to do so, may amend his answer at any time. Both complaints and answers shall be verified.

Notification of State or local agency of violation of State or local fair housing law; commencement of State or local law enforcement proceedings; certification of circumstances requisite for action by Secretary

(c) Wherever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter, the Secretary shall notify the appropriate State or local agency of any complaint filed under this subchapter which appears to constitute a violation of such State or local fair housing law, and the Secretary shall take no further action with respect to such complaint if the appropriate State or local law enforcement official has, within thirty days from the date the alleged offense has been brought to his attention, commenced proceedings in the matter, or, having done so, carries forward such proceedings with reasonable promptness. In no event shall the Secretary take further action unless he certifies that in his

judgment, under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require such action.

Commencement of civil actions; State or local remedies available; jurisdiction and venue; findings; injunctions; appropriate affirmative orders

(d) If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (e) of this section, the Secretary has been unable to obtain voluntary compliance with the subchapter, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this subchapter, insofar as such rights relate to the subject of the complaint: *Provided*, That no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter. Such actions may be brought without regard to the amount in controversy in any United States district court for the district in which the discriminatory housing practice is alleged to have occurred or be about to occur or in which the respondent resides or transacts business. If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may, subject to the provisions of section 3612 of this title, enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate.

Burden of proof

(e) In any proceeding brought pursuant to this section, the burden of proof shall be on the complainant.

Trial of action; termination of voluntary compliance efforts

(f) Whenever an action filed by an individual, in either Federal or State court, pursuant to this section or section 3612 of this title, shall come to trial the Secretary shall immediately terminate all efforts to obtain voluntary compliance.

§ 3612. Enforcement by private persons

Civil action: Federal and State jurisdiction; complaint; limitations; continuance pending conciliation efforts; prior bona fide transactions unaffected by court orders

(a) The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however*, That the court shall continue such civil case brought pursuant to this section or section 3610(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however*, That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

Appointment of counsel and commencement of civil actions in Federal or State courts without payment of fees, costs, or security

(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

Injunctive relief and damages; limitation; court costs; attorney fees

(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

Statement Of The Case

On October 25, 1975, six individual plaintiffs, the Village of Bellwood, Illinois, and the Leadership Council for Metropolitan Open Communities filed an action in the United States District Court for the Northern District of Illinois, alleging that Gladstone, Realtors,[®] and six of its salespersons had engaged in the practice of racial steering of prospective home purchasers in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1982, and the Fair Housing Act of 1968, 42 U.S.C. § 3604. Federal jurisdiction was alleged under 28 U.S.C. §§ 1333(4) and 2201, as well as 42 U.S.C. § 3612. On the same date, the same plaintiffs filed a substantially identical complaint against defendants

Robert A. Hintze, Realtors,[®] and three of its employees. Gladstone, Realtors,[®] and Robert A. Hintze, Realtors,[®] are both real estate brokerage firms doing business in Bellwood, Illinois.

The individual plaintiffs in both actions were four white residents of Bellwood, a black resident of Bellwood, and a black resident of another municipality. Initially, they alleged two distinct injuries: that they had "been denied their right to select housing without regard to race and [that they had] been deprived of the social and professional benefits of living in an integrated society." *Gladstone Complaint* ¶ 12; *Hintze Complaint* ¶ 13. In response to defendants' requests for admissions, however, the individual plaintiffs admitted that they had acted only as investigators or testers; none of them had intended to purchase a home in Bellwood during the relevant time period. *Gladstone Plaintiffs' Admissions* A-1; *Hintze Plaintiffs' Admissions* A-1. Moreover, in answers to interrogatories, plaintiffs were unable to identify any bona fide homeseeker whom they believed to have "used or sought to use [defendants'] services . . . and whose choice was influenced on the basis of race." *Gladstone Plaintiffs' Answers To Interrogatories* 12(d); *Hintze Plaintiffs' Answers To Interrogatories* 12(d).

Consequently, the individual plaintiffs' claim of injury rests solely on the generalized allegation that they were denied the benefits of living in an integrated society. The Village of Bellwood also based its claim for relief on the generalized allegation that "the housing market in said village [was] wrongfully and illegally manipulated to the economic and social detriment of the citizens of such village." *Gladstone Complaint* ¶ 11; *Hintze Complaint* ¶ 12. Finally, the Leadership Council for Metropolitan

Open Communities, a voluntary association dedicated to open housing, alleged that "[s]uch acts and practices . . . hamper and interfere with [its] work and purpose . . . and cost [it] money to provide an audit and other efforts to eliminate such unlawful acts." *Gladstone Complaint* ¶ 10; *Hintze Complaint* ¶ 11.

In both cases, plaintiffs sought damages, a declaratory judgment, and injunctive relief. First, plaintiffs sought a declaratory judgment that the individual plaintiffs could not be denied the right to inspect, negotiate for purchase, and purchase homes without regard to race. Second, they asked that defendants be permanently enjoined from racial steering, from attempting to dissuade homeseekers from purchasing homes in particular areas because of racial characteristics, and from encouraging homeseekers to purchase homes in particular areas because of racial characteristics. Third, plaintiffs asked that they be awarded compensatory and punitive damages amounting to several hundred thousand dollars, as well as costs and attorneys' fees.

The *Gladstone* case was assigned to Hon. Bernard M. Decker, United States District Judge for the Northern District of Illinois; the *Hintze* case was assigned to Hon. Joseph Sam Perry, United States Senior District Judge for the Northern District of Illinois. In July 1976, on the basis of plaintiffs' answers to interrogatories and formal admissions, defendants moved for summary judgment in both cases; they argued that plaintiffs had not established an actionable claim or standing to sue under Sections 1982, 3604, and 3612 of Title 42, and that they had failed to demonstrate the existence of a case or controversy under Article III of the United States Constitution.

On September 23, 1976, Judge Decker granted defendants' motion for summary judgment. The district court found that the individual plaintiffs were merely investigators or testers, and that none of them had made any bona fide effort to purchase a home in Bellwood during the relevant period. *Appendix 2*. Consequently, the individual plaintiffs could not have been denied the right to select housing without regard to race. At most, the individual plaintiffs could have suffered only the indirect or generalized injury of being denied the benefits of living in an integrated society.

Relying on the Ninth Circuit's decision in *TOPIC v. Circle Realty*, 532 F.2d 1273 (9th Cir.), cert. denied, 429 U.S. 859 (1976), Judge Decker held that the individual plaintiffs lacked standing to sue because "a cause of action under § 3612 exists only for 'the direct victims' of a practice proscribed by § 3604." *Appendix 4*. The district court also held that plaintiffs' allegations of indirect injury failed to state a claim under Section 1982. *Appendix 7*. Finally, the district court held that neither the Village of Bellwood nor the Leadership Council had suffered a cognizable injury. *Appendix 2, 5*.

On September 29, 1976, Judge Perry granted defendants' motion for summary judgment in *Hintze*. Judge Perry adopted Judge Decker's opinion in *Gladstone*, which he found dispositive, because "the complaint in the aforesaid case is almost a verbatim duplicate of the complaint in the instant case." *Appendix 8*. A timely notice of appeal was filed in both cases, which were consolidated for purposes of appeal on January 12, 1977.

On January 25, 1978, the Court of Appeals for the Seventh Circuit reversed in part the decisions of the district court. The Court of Appeals held that the Leader-

ship Council's "interest in open housing matters and its asserted commitment to effectuating that interest, albeit commendable, do not substitute for the concrete injury constitutionally required to invoke the jurisdiction of the federal courts." *Appendix 15*. The court also held, however, that the individual plaintiffs and the Village of Bellwood had stated a claim and had standing to sue under Sections 3604 and 3612. *Appendix 15-16*.

The Court of Appeals held that the individual plaintiffs, as residents of the Bellwood community, had standing to complain that they had lost the benefits of living in an integrated society. The Seventh Circuit relied on *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), in which this Court held that residents of an apartment complex had standing under Section 3610, another section of the Fair Housing Act, to complain that their landlord's rental practices had deprived them of the social and professional benefits of living in an integrated community. While noting that *Trafficante* was not technically controlling in the present case, the Court of Appeals held that "its thrust and rationale plainly suggest that the individual plaintiffs and the Village of Bellwood have standing." *Appendix 18*.

The Seventh Circuit explicitly rejected the *TOPIC* court's conclusion that Section 3612 should be construed more narrowly than Section 3610, although it acknowledged that that view was "not without some plausibility." *Appendix 17*. Recognizing that its decision created a conflict among the circuits, with respect to an important question of federal statutory construction, the hearing panel took the unusual step of circulating its opinion among all judges of the court in regular active service, prior to the announcement of its decision. *Appendix 18 n.7*.

With respect to the Village of Bellwood, the Court of Appeals found it unnecessary to determine "whether or not [the Village] would have standing if the sole injury alleged was the deprivation to its citizens of the benefits of integrated living [because] . . . it is apparent that specific concrete injury with a substantial nexus to the Village's status as a unit of government could be proved under these complaints." *Appendix 14*.

Reasons For Granting The Writ

I.

The Decision Of The Court Of Appeals In This Case Directly Conflicts With The Ninth Circuit's Decision In *TOPIC v. Circle Realty* On An Important Question Of Federal Statutory Construction.

Although the individual plaintiffs had no intention of purchasing a home, the Seventh Circuit held that they had stated a claim under Section 3604, and that they had standing to sue under Section 3612, because they alleged that defendants had denied them the benefits of living in an integrated society. *Appendix 19*. The Court of Appeals also held that the Village of Bellwood had stated a claim and had standing to sue. *Appendix 14*. The Seventh Circuit's decision directly conflicts with the Ninth Circuit's decision in *TOPIC v. Circle Realty*, 532 F.2d 1273 (9th Cir.), *cert. denied*, 429 U.S. 859 (1976), in which the court held that a complaint, substantially identical to the complaint herein, failed to state a claim upon which relief could be granted. Indeed, the only material difference between the two complaints is that the *TOPIC* plaintiffs claimed to have lost the benefits of living in an integrated *community*, while the plaintiffs herein claim that defendants deprived them of the benefits of living in an integrated *society*. If anything, the injury alleged in the present case is more generalized, and less susceptible to adjudication, than that which was alleged in *TOPIC*.

In *TOPIC*, an association dedicated to open housing, and three of its members, alleged that certain real estate brokers in Torrance and Carson, California, had engaged

in the racial steering of homeseekers in violation of Section 3604. Plaintiffs further alleged that they had standing to sue under Section 3612. The individual plaintiffs were not actual homeseekers, and they had suffered no direct injury due to the alleged racial steering. Instead, they alleged that they had been injured indirectly by being "deprived of the important social and professional benefits of living in an integrated community." *Id.*, 1274. The *TOPIC* plaintiffs also based their claim of injury on the allegation that they had "suffered and will continue to suffer embarrassment and economic damage in their social and professional activities from being stigmatized as residents of either white or black ghettos." *Id.*

The *TOPIC* plaintiffs sought to assure the justiciability of their claim by describing their alleged injury in the same words used by the plaintiffs in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). In *Trafficante*, this Court held that certain tenants of an apartment complex were "persons aggrieved" within the meaning of Section 3610, and had standing to challenge their landlord's discriminatory rental practices because those practices deprived them of the benefits of living in an integrated community, even though they were not direct victims of discrimination. The *TOPIC* court held, however, that this Court's holding in *Trafficante* was inapposite because it applied only to cases brought under Section 3610, which created a remedial scheme entirely dissimilar in structure and purpose from that established by Section 3612.¹ The

¹ The *TOPIC* court also noted that the plaintiffs therein might not have standing in a constitutional sense because, unlike the plaintiffs in *Trafficante*, they were not residents of a single apartment complex, and the relationship between defendants' conduct and the claimed injury "may be so attenuated as to negate the existence of any injury in fact." *TOPIC, supra*, 1275. See also pp. 25-29, *infra*.

court discussed the significance of the procedural differences between the two sections:

The Supreme Court has recently characterized its earlier interpretation of section 3610 in *Trafficante* as giving residents of housing facilities "an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others." *Warth v. Seldin, supra*, 422 U.S. at 513, 95 S.Ct. at 2212, 45 L.Ed.2d at 363. The narrower language of section 3612, on the other hand, precludes suit by such individuals. By permitting suit only to enforce certain enumerated rights, that section provides access to the courts only to those who are granted rights by the Act, namely, those who are the direct objects of the practices it makes unlawful.

Section 3604 grants rights not to be discriminated against in the sale or rental of housing. . . . Although the complaint alleges that racial steering is a practice which violates section 3604, we conclude that only the direct victims of such a practice have a cause of action under section 3612.

TOPIC, supra, 1275.

The *TOPIC* court emphasized that its construction of Section 3612, permitting actions to be brought only by direct victims of discrimination, was essential to any rational construction of the Fair Housing Act as a whole.²

² The *TOPIC* court's construction also conserves scarce judicial resources by limiting immediate judicial relief to direct victims of discrimination, thereby increasing the likelihood that timely judicial relief will be afforded to those persons. If an individual is denied the opportunity to purchase or lease a particular dwelling because of discrimination, he will need extraordinary relief to guarantee that the dwelling he seeks is not sold or leased before his claim can be heard. By limiting immediate access to the courts to direct victims of discrimination, the *TOPIC* court's construction increases the likelihood that that relief will be available. The *TOPIC* court's construction thus furthers judicial economy as well as an important purpose of the Fair Housing Act.

Section 3610, which permits actions to be brought by some indirect victims of discrimination, as well as by persons directly affected by discrimination, requires compliance with important preliminary procedures before an action may be brought in federal court.³ Section 3612, on the other hand, creates immediate and unconditional jurisdiction in the federal courts. "To accept [the] argument that sections 3610 and 3612 extend to identical classes of plaintiffs would destroy this statutory pattern, for the procedural prerequisites of section 3610 could then be avoided in every case." *Id.*, 1276. Consequently, the *TOPIC* court held that the immediate federal judicial remedy established by Section 3612 is available only to persons who are direct victims of discrimination. Persons who claim to have been harmed indirectly, in the generalized sense of being denied the benefits of an integrated society, are remitted to their Section 3610 remedies.⁴

³ Putative plaintiffs must first exhaust federal administrative remedies. 42 U.S.C. § 3610(a). Thereafter, they must avail themselves of "substantially equivalent" state remedies. *Id.*, § 3610(c). As this Court noted in *Hunter v. Erickson*, 393 U.S. 385, 388 (1969), the Fair Housing Act "specifically preserves and defers to local fair housing laws." If state judicial remedies are available, they will preempt the federal judicial remedy. 42 U.S.C. § 3610(d). See pp. 19-21, *infra*. The Illinois legislature has delegated broad powers to its political subdivisions to prohibit discrimination in housing. See Ill.Rev. Stats. ch. 24, § 11-11.1-1 (1977); *id.*, ch. 111, § 5742 (1977). Inasmuch as the sovereign has delegated this authority to municipalities, it is difficult to see why municipalities should need standing to sue under Section 3612 of the Fair Housing Act to promote their governmental objectives. Congress recognized this fact in enacting Section 3612 to provide for "Enforcement by private persons."

⁴ The *TOPIC* court also held that plaintiffs had no cause of action under Section 1982. *TOPIC, supra*, 1274 n.4. The Ninth Circuit's analysis is well supported by this Court's decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968), in which the Court said, "Whatever else it may be, 42 U.S.C. § 1982 is not a comprehensive open housing law." The Seventh Circuit appears not to have reached this question, at least explicitly, in the present case. *Appendix* 15 n.4.

The decision herein directly conflicts with the Ninth Circuit's decision in *TOPIC*. Apart from their holdings, the cases are indistinguishable in all material respects. In both cases, persons who were not direct victims of discrimination brought suit, under Section 3612, claiming that they had been denied the right to live in an integrated community or in an integrated society. The Seventh Circuit recognized that the *TOPIC* decision was "not without some plausibility," but concluded that that case was wrongly decided. *Appendix 17, 18.* The Seventh Circuit unequivocally rejected the Ninth Circuit's construction of Section 3612. *Appendix 18 n.7.*

The courts of appeals are now divided on the proper construction to be given an important Act of Congress.⁵ The positions taken by the courts are irreconcilable and the granting of a writ of certiorari is necessary to resolve this conflict.

II.

The Decision Of The Court Of Appeals In This Case Is Inconsistent With The Language, Remedial Structure, And Policy Of The Fair Housing Act Of 1968.

The Court of Appeals acknowledged that its decision, with respect to the claims of the individual plaintiffs and the Village of Bellwood, was irreconcilable with the Ninth

⁵ Several district courts have also considered this question. See *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.*, 429 F.Supp. 486 (E.D.N.Y. 1977); *Fair Housing Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Service, Inc.*, 422 F.Supp. 1071 (D.N.J. 1976); *Village of Park Forest v. Fairfax Realty, P.H.E.O.H. Rep.* ¶ 13,699 (N.D. Ill. 1975) and ¶ 13,784 (N.D. Ill. 1976); *Heights Community Congress v. Rosenblatt Realty, Inc.*, 73 F.R.D. 1 (N.D. Ohio 1975).

Circuit's decision in *TOPIC*. The Court of Appeals based its decision, however, on the assumption that persons complaining of a generalized injury to their interest in living in an integrated society must have an actionable claim under Section 3612 because tenants of an apartment complex have standing under Section 3610 to complain that they have lost the benefits of living in an integrated community.⁶ The Fair Housing Act demonstrates not only that that assumption is unwarranted, but that it is in fact incompatible with the language, remedial structure, and legislative policy of the Act.

The Seventh Circuit's expansive construction of Section 3612 ignores a cardinal rule of statutory construction: that the sections of a statute must be construed "in connection with every other . . . section so as to produce a harmonious whole." 2A C. Sands, *Sutherland Statutory Construction* § 46.05, p. 56 (4th ed. 1973). Indeed, the Seventh Circuit recognized that its construction of Section 3612 "may to some degree seem to offend a judicial penchant for consistency [in that it implies] that Congress has, in the same act, established an administrative remedy and authorized plaintiffs, at their discretion, to bypass it." *Appendix 20.*

Section 3610 establishes an elaborate procedure for protecting the rights of a "person aggrieved," defined in that section as "[a]ny person who claims to have been injured

⁶ The circumstances of persons living in an apartment complex are not, of course, analogous to those of persons living in a larger community. See pp. 28-29, *infra*. Moreover, the benefits of living in an integrated society are immeasurably more diluted than the benefits of living in a smaller and more discrete integrated community such as an apartment complex. See pp. 14-15, *supra*; pp. 28-29, *infra*.

. . . or who believes that he will be irrevocably injured by a discriminatory housing practice." 42 U.S.C. § 3610(d). In *Trafficante*, this Court held that the use of "the words [“person aggrieved”] showed ‘a congressional intention to define standing as broadly as is permitted by Article III . . .’ insofar as tenants of the same housing unit that is charged with discrimination are concerned.” *Trafficante, supra*, 209. While Section 3610 provides for broad standing, it does not provide for immediate access to the federal courts. A putative plaintiff must first allow the Secretary of Housing and Urban Development an opportunity to eliminate the alleged discriminatory practice by informal means. 42 U.S.C. § 3610(a). Moreover, if state or local governments provide rights and remedies substantially equivalent to those provided by federal law, the Secretary must allow them an opportunity to resolve the dispute. *Id.*, § 3610(d). In either event, no suit may be brought for an additional thirty days while the conciliation process takes place. *Id.* Finally, no federal court action may ever be brought under Section 3610 if substantially equivalent remedies are available at state law. *Id.*

In Section 3610, Congress expressed a strong commitment both to the use of federal administrative remedies, and to the development of effective state and local remedies, to implement the nation’s fair housing policy. In requiring that putative plaintiffs exhaust state and local remedies, Congress recognized the important role that state and local officials have traditionally enjoyed in the housing area. *See Hunter v. Erickson*, 393 U.S. 385, 388 (1969). Congress wisely recognized that our national housing goals could not be attained solely by federal court litigation, but that voluntary compliance and increased efforts by state and local officials were also necessary. The opportunity

for systematic circumvention of these remedies, which is implicit in the Seventh Circuit’s construction of Section 3612, will frustrate rather than enhance the attainment of these goals.

Sections 3610 and 3612 must be construed together to best effectuate the purposes of Section 3610’s elaborate remedial scheme. The Ninth Circuit’s decision in *TOPIC* provides that construction:

While . . . section [3610] provides a remedy for a broad spectrum of individuals aggrieved by discrimination, the judicial system is not the initial forum for relief and thus is protected from a potential excess of litigation. Section 3612 provides preferential access to judicial processes as necessary for those individuals who are the primary victims of the illegal acts of discrimination. Such persons are likely to suffer grave and immediate harm and judicial relief may be necessary for the full vindication of their rights.

TOPIC, supra, 1276.

The Ninth Circuit’s analysis is supported by both the language and policy of the Fair Housing Act. The broad standing granted by Section 3610 rests on its promise of relief to any “person aggrieved,” which demonstrates “a congressional intention to define standing as broadly as is permitted by Article III.” *Trafficante, supra*, 209. By contrast, Section 3612 does not, in terms, contain any such broad grant of standing. The focus of Section 3612 is more narrow: it merely provides that certain enumerated rights, granted by four other sections of the Act, “may be enforced by civil actions.” 42 U.S.C. § 3612(a). Because Congress chose not to use the broad language of Section 3610 in Section 3612, it is obvious that Congress had a more limited objective in mind; namely, that an action could be brought under Section 3612 only by those persons whose rights were directly violated.

Of the four sections which grant rights enforceable under Section 3612, the plaintiffs herein allege a violation of only Section 3604, which proscribes certain discriminatory practices in the "sale or rental" of housing. 42 U.S.C. § 3604. Because the individual plaintiffs were not bona fide home-seekers, they could not have been discriminated against in the sale or rental of housing. Plaintiffs' allegations of racial steering thus constitute an attempt to enforce the Section 3604 rights of others which they believe may have been violated. However, even in cases involving fundamental constitutional rights, such as those protected by the Fourth Amendment, this Court has followed the principle that persons may not assert the rights of others. *Alderman v. United States*, 394 U.S. 165 (1969). The Seventh Circuit apparently believed that enforcement of the Fair Housing Act would be facilitated by permitting parties to assert the rights of others, but that view is erroneous. While certain goals of the Fair Housing Act might be furthered by third-party standing, equally important goals will certainly be frustrated.⁷ Moreover, the Seventh

⁷ By encouraging circumvention of Section 3610 procedures, the Seventh Circuit's decision diminishes both HUD's role in effecting voluntary compliance and the role of state remedies. Actions brought by persons who are not directly affected by alleged discriminatory practices present the ideal circumstances, as Congress realized, for informal conciliation by state and federal officials. The Seventh Circuit's construction will frustrate the efforts of such officials; it is unwarranted under the Act; and it is probably counterproductive in the battle against discrimination. State and local authorities will not be encouraged, as Congress intended, to be active in the regulation of this field, which has been traditionally committed to them. See pp. 19-21, *supra*. Moreover, the potential for serious harassment of innocent parties is greatly increased if the restraining influence of Section 3610 procedures is supplanted by immediate federal litigation in every case.

Circuit's approach is unconvincing, as a matter of policy, in that third-party standing would also facilitate enforcement of the Fourth Amendment, but this Court has rejected that reasoning in the Fourth Amendment area. *Alderman, supra*. The need for enforcing the policy of the Fair Housing Act cannot constitute a more compelling justification for third-party standing than can the need for enforcing fundamental constitutional guarantees.⁸

Recognition of the differences in coverage between Sections 3610 and 3612 is the only construction consistent with the remedial scheme established by Congress. That construction preserves the viability of Section 3610, and it imputes to Congress the rationality which legislative bodies are presumed to possess. The Seventh Circuit's rejection of that construction, on the other hand, rests on an improper understanding of the Act's exceedingly scant legislative history. The Court of Appeals was persuaded by floor statements of three congressmen, one of whom opposed the bill, that the remedial provisions of the two sections were merely alternatives. *Appendix 19*. Those statements are partially correct, of course, because the two sections do provide alternative remedies for direct victims of discrimination. On the other hand, the legislative history contains no evidence that Congress ever considered the possibility that someone, other than a direct victim of dis-

⁸ Moreover, in Fair Housing Act cases, unlike Fourth Amendment cases, an alternative remedy always exists under Section 3610. The Seventh Circuit's construction is also implausible in that it imputes to Congress an intention to create standing in circumstances where it is constitutionally prohibited from doing so. U.S. Const.Art.III; *Trafficante, supra*, 212 (White, J., concurring). See also pp. 25-29, *infra*.

ermination, might sue under the Act. Consequently, the authority of the isolated remarks quoted by the Seventh Circuit is necessarily suspect because those remarks were probably based on the assumption that only direct victims of discrimination could sue under the Act, and that assumption is exactly contrary to the court's use of those remarks. As Justice Douglas observed in *Trafficante*, "The legislative history of the Act is not too helpful." *Trafficante, supra*, 210. Given the ambiguous nature of the legislative history, the Seventh Circuit erred in relying on it to defeat the plain language and remedial structure of the Act.⁹

The decision of the Court of Appeals is inconsistent with the language and remedial structure of the Fair Housing Act. Moreover, it draws little support from legislative history, and it is unjustified by policy considerations. For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals.

⁹ The Court of Appeals was also persuaded that plaintiffs had standing because of what it believed to be HUD's interpretation of the Act. Appendix 20. The Court's reliance on 24 C.F.R. § 105.16 is misplaced, however, because that regulation concerns only Section 3610 procedures; it does not purport to construe Section 3612. Even if that regulation did purport to construe Section 3612, however, the agency's construction of the statute could not diminish this Court's power to interpret the laws. The determination of standing is a uniquely judicial task, in which this Court may not "abdicate its ultimate responsibility to construe the language employed by Congress." *Zuber v. Allen*, 396 U.S. 168, 193 (1969).

III.

The Decision Of The Court Of Appeals In This Case Is Inconsistent With The Case Or Controversy Limitation Imposed On The Federal Courts By Article III Of The United States Constitution.

The purpose of Congress in enacting the Fair Housing Act of 1968 was "to provide, *within constitutional limitations*, for fair housing throughout the United States." 42 U.S.C. § 3601 (emphasis added). Foremost among constitutional limitations, of course, are those imposed by Article III. U.S. Const.Art.III. As this Court has previously recognized, "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37 (1976). To establish the existence of a justiciable case or controversy, a plaintiff must demonstrate that he will personally suffer a concrete injury in the absence of judicial relief, that prospective relief will remove the harm, and that a plausible causal connection exists between the alleged injury and the defendant's actions. *See Warth v. Seldin*, 422 U.S. 490, 505 (1975). "Concrete injury . . . adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful." *Schlesinger v. Reservists To Stop War*, 418 U.S. 208, 220-1 (1974). Moreover "a 'generalized grievance' shared in substantially equal measure by . . . a large class of citizens . . . normally does not warrant exercise of jurisdiction." *Warth, supra*, 499.

The Seventh Circuit's decision is inconsistent with the limitations of Article III because the injury alleged is merely a generalized injury, and it is causally related to defendants' alleged activities only in the most attenuated

sense. Plaintiffs' allegations are constitutionally insufficient to constitute a case or controversy.

The individual plaintiffs contend that they were injured because defendants' alleged steering of homeseekers "deprived [plaintiffs] of the social and professional benefits of living in an integrated society." *Gladstone Complaint* ¶ 12; *Hintze Complaint* ¶ 13.¹⁰ The Village of Bellwood claims that it suffered injury because the alleged practice of racial steering resulted in "the economic and social detriment of the citizens of such village." *Gladstone Complaint* ¶ 11; *Hintze Complaint* ¶ 12. This language shows that the Village brings this action derivatively to vindicate the rights of its residents. Contrary to the conclusion reached by the Court of Appeals (*Appendix* 14), the Village's claim is substantially identical to that of the individuals, and the justiciability of those claims must stand or fall together.

Plaintiffs base their claim on an abstract or generalized injury, but this Court has frequently recognized that an abstract injury, even when it implicates cherished values, will not give rise to a case or controversy. For instance, a citizen has a justifiable interest in the proper administration of justice in his community, but the Court has held that that interest will not, by itself, support a chal-

¹⁰ Initially, the individual plaintiffs also alleged that they were "denied their right to select housing without regard to race." *Id.* During discovery, however, they admitted that they had not been injured in this manner because they had acted only as testers in the investigatory stage of this litigation, and they never had any intention of purchasing a home. *Gladstone Plaintiffs' Admissions* A-1; *Hintze Plaintiffs' Admissions* A-1. Moreover, at the time that summary judgment was granted, plaintiffs had failed to support their generalized allegations by identifying any bona fide homeseeker whom they believed to have been steered. *Gladstone Plaintiffs' Answers To Interrogatories* 12(d); *Hintze Plaintiffs' Answers To Interrogatories* 12(d).

lenger to unlawful practices in the administration of justice. *O'Shea v. Littleton*, 414 U.S. 488 (1974). See also *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973). In another context, this Court has said that:

In some fashion, every provision of the Constitution was meant to serve the interests of all. Such a generalized interest, however, is too abstract to constitute "a case or controversy" appropriate for judicial resolution. The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.

Schlesinger, supra, 226-7 (footnote omitted). The Court's analysis is equally applicable to statutory provisions.

In limiting the jurisdiction of the federal courts to actual cases and controversies, the framers of Article III determined that alleged illegality, even when it affects values cherished by the community, must be adjudicated by persons whose particularized interests are put directly at issue. Certainly, a citizen's generalized interest in living in an integrated community is an important interest, just as is his interest in living in a community free from judicial impropriety. In both cases, however, Article III requires that the vindication of these generalized interests be undertaken by persons whose particularized interests are also at stake.

Criminal defendants play an important role in our system of government by protecting the community's interest in the impartial administration of justice. Our system of government likewise requires that the generalized right to live in an integrated society must be vindicated in judicial proceedings instituted by persons who are directly affected by discrimination. The decision of the Court of Appeals is, therefore, inconsistent with the central meaning of Article III.

In construing Section 3612 to permit suits by persons who are not direct victims of discrimination, the Court of Appeals erroneously relied on this Court's decision in *Trafficante, supra*. While acknowledging that *Trafficante* was not technically controlling, the Court of Appeals thought that it stood for the broad proposition that an allegation of injury to a citizen's generalized interest in living in an integrated society would categorically assure justiciability. This Court's holding in *Trafficante* was considerably more narrow: the Court merely held that a group of tenants, who complained that their landlord's rental practices deprived them of the benefits of living in an integrated community, had alleged a sufficiently particularized injury to meet the requirements of Article III. The limited nature of the Court's holding is underscored by the separate concurrence of Justice White, joined by Justices Blackmun and Powell, who said that he "would sustain the statute insofar as it extends standing to those in the position of the petitioners in this case." *Id.*, 212 (White, J., concurring).

A tenant's interest in living in an integrated apartment complex is not analogous, for constitutional purposes, to a citizen's interest in living in an integrated society. A citizen's interest in living in an integrated society is necessarily less particularized and more diluted. Likewise, an apartment complex is an artificial and controlled environment in that a landlord's alleged discrimination may be both the necessary and sufficient cause of a tenant's loss of the opportunity to live in an integrated community. By contrast, many independent economic and social forces are implicated when the focus is shifted to a larger community.

In the present case, the plaintiffs' interests as members of a society are infinitely more generalized than the interests at stake in *Trafficante*. Moreover, the alleged causa-

tion between plaintiffs' alleged injury and defendants' alleged activities is singularly attenuated, if it exists at all. Plaintiffs have failed, consequently, "to meet the minimum requirements of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Warth, supra*, 505.

The decision of the Court of Appeals, which permits suits by natural persons and municipalities, who have no particularized interest and can demonstrate only the most attenuated causation, is inconsistent with the limitations imposed on the federal courts by Article III. It is also inconsistent with traditional principles of fairness, which protect defendants against oppressive litigation and multiplicity of suits. For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals.

CONCLUSION

For all of the reasons stated herein, petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Dated: April 19, 1978

APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

NO. 75 C 3587

VILLAGE OF BELLWOOD, etc., et al.,

Plaintiffs,

-vs-

GLADSTONE REALTORS, et al.,

Defendants.

MEMORANDUM OPINION

The instant complaint alleges that the defendants, a real estate business and its salespersons and agents, engaged in the illegal practice of racial steering. This consists of efforts to influence the choice of prospective homebuyers on the basis of race by discouraging prospective black homebuyers from purchasing homes in predominantly white areas. The action is based upon Title VIII, the Fair Housing Act of 1968, 42 U.S.C. §3601 *et seq.*, and upon 42 U.S.C. §1982, the Civil Rights Act of 1866.

There are several plaintiffs. The six individual plaintiffs include four white residents of Bellwood, Illinois, and two blacks, one a resident of Bellwood, the other a resident of Maywood, Illinois. These plaintiffs were investigators who audited the defendant for compliance with the civil rights statutes. In the process of this investigation, sev-

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eral of the plaintiffs¹ acted as testers, individuals who posed as prospective homebuyers in order to ascertain the practices of the realtor. They assert that they "have been denied their right to select housing without regard to race and have been deprived of the social and professional benefits of living in an integrated society" by means of defendants' challenged practices. The remaining plaintiffs are Leadership Council for Metropolitan Open Communities, a not-for-profit corporation charged with combatting housing discrimination, and the Village of Bellwood, a municipal corporation located in Cook County. The Leadership Council asserts that the challenged practices interfere with its work and purpose, and that it has been forced to expend sums "to provide an audit and other efforts to eliminate such unlawful acts." The Village of Bellwood complains that it "has been injured by having the housing market in [Bellwood] wrongfully and illegally manipulated to the economic and social detriment of the citizens of [Bellwood]."

Federal jurisdiction has been invoked in this case under 42 U.S.C. §3612 and 28 U.S.C. §§1343(4) and 2201. The defendants have moved for summary judgment.

The evidence before the court reveals that the plaintiffs lack standing to bring this action either under the 1866 Civil Rights Act or under 42 U.S.C. §3612. The plaintiffs have asserted that the acts which constitute the evidence of the alleged racial steering are those described in the audit reports. The instant case therefore does not in-

¹ Several of the testers seemingly were not plaintiffs, and the parties' briefs make it uncertain whether all of the plaintiffs were in fact testers. In any case it is nowhere claimed that any of the plaintiffs were in reality prospective homebuyers.

volve racial steering directed at actual home seekers. As a consequence, the plaintiffs can only claim to have suffered indirect injury from the actions of the defendants.

The factual circumstances and the legal issues of this case closely resemble the recently decided case of *Topic v. Circle Realty*, 532 F.2d 1273 (9th Cir. 1976). That action was also based upon 42 U.S.C. §1982 and upon the Fair Housing Act of 1968 by utilizing the jurisdiction provisions of 42 U.S.C. §3612. The plaintiffs included an unincorporated civil rights organization and three individual members. Using investigatory tactics similar to those employed by the Leadership Council in the instant case, Topic sent out housing testers to examine the business practices of real estate brokers in Torrance and Carson, California. The plaintiffs found evidence of racial steering; however, none "were actual homeseekers subjected to racial steering", 532 F.2d at 1274. The injuries complained of by the plaintiffs were substantially identical to those found in the instant complaint, with the obvious exception that the municipalities involved did not join in the *Topic* suit.

The district court determined that the §1982 claim should be dismissed,² and on interlocutory appeal, the Ninth Circuit held that the plaintiffs likewise lacked standing to bring an action under §3612 because that section "does not authorize lawsuits to vindicate the rights of third parties." 532 F.2d at 1275.

² The district court actually noted in a footnote that the plaintiffs could not prosecute a §1982 claim, but omitted the dismissal of that count in its order. The Ninth Circuit treated that as an oversight, and expressly affirmed the dismissal of the §1982 claim. 532 F.2d 1274 fn. 4.

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The *Topic* suit, like the present case, asserted a violation of the substantive provisions of 42 U.S.C. §3604,³ which guarantees the right not to be discriminated against in the sale or rental of housing. The Ninth Circuit asserted that a cause of action under §3612 exists only for "the direct victims" of a practice proscribed by §3604. The plaintiffs in *Topic* were held not to be "direct victims".

³ Section 3604 provides:

"As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

"(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

"(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

"(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

"(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

"(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex or national origin."

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The plaintiffs in the present case do not challenge the statutory construction reached by the Ninth Circuit.⁴ Their efforts to factually distinguish themselves from the *Topic* plaintiffs are halfhearted and unpersuasive. The inclusion of the municipality in the instant action does not alter the indirect nature of the grievances since Bellwood is challenging *in parens patriae* fashion actions to the detriment of its citizens.⁵

The legal complexities in *Topic* and the instant case arise from the fact that the Fair Housing Act contains two jurisdictional provisions, §3610 and §3612. The former requires the performance of certain preliminary procedures before redress may be sought in federal court. These include the filing of a complaint with the Secretary of Housing and Urban Development. The Secretary is given time to investigate and to attempt an administrative resolution of the dispute. He is directed to give local authorities the first opportunity to resolve the controversy in the event that equivalent procedures are available under state

⁴ The plaintiffs do cite *Bell Realty v. Chicago Commission on Human Relations*, 130 Ill.App.2d 1072 (1st Dist. 1971), for the principle that minority testers have a cause of action if they are denied housing opportunities available to whites. However, that case in fact dealt with a license suspension under a Chicago ordinance. The question of standing under the Fair Housing Act was not even remotely at issue in that case, and the testers were in fact not parties to the proceeding.

On the other hand, the court notes that indirect victims of steering were seemingly allowed to proceed with an action under §3612 in *Zuch v. Hussey*, 394 F.Supp. 1028 (E.D.Mich. 1975). The *Zuch* court however did not consider the standing issue, and the well-reasoned *Topic* opinion is the only Court of Appeals decision dealing with this question.

⁵ The court does not reach the challenge raised by defendants to the standing of a municipal corporation under the Fair Housing Act.

or local law. Thirty days are set aside for conciliation efforts, and the action can be brought in federal district court only in the absence of substantially equivalent state law remedies. By contrast, §3612 provides immediate access to a federal forum without any such preconditions.

The Ninth Circuit carefully analyzed the relationship between these two jurisdictional sections, and determined that Congress intended that the "preferential access to judicial processes" found in §3612 be limited to "those individuals who are the primary victims of the illegal acts of discrimination." 532 F.2d at 1276. The Supreme Court has expansively defined the class of individuals with sufficient standing to bring an action under §3610. *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205 (1972). The Ninth Circuit properly notes that the procedural prerequisites of §3610 would become meaningless if both it and §3612 had identical standing requirements. The court considered that the conciliation processes of §3610 were particularly needed and appropriate in situations where there was no direct injury and "a delay in plaintiffs' access to court would not significantly worsen plaintiffs' injuries, if at all." 532 F.2d at 1276. To hold to the contrary would render meaningless the statutory pattern and create "a potential excess of litigation" by providing immediate access to federal court for both direct and indirect grievants.

The plaintiffs argue that their situation is more analogous to that found in *Trafficante*. But the Supreme Court only found the existence of standing under §3610; this action is based upon §3612 and upon a §1982 claim.⁶

⁶ The fact that the Supreme Court addressed the question of standing solely in the context of §3610 underscores the Ninth Circuit conclusion that the standing requirements of §3612 may be more restricted.

Trafficante had originally been brought under both 42 U.S.C. §§3610 and 3612 and under 42 U.S.C. §1982. 446 F.2d 1158, 1161 (9th Cir. 1971). The Ninth Circuit held that the plaintiffs lacked standing under the Fair Housing Act provisions and under §1982. In reversing that decision, the Supreme Court expressly did not consider that part of the holding dealing with standing under §1982. 409 U.S. 205 at 208, fn. 8. Thus *Trafficante*, rather than supporting plaintiffs' claim under the 1866 Act, in fact argue against their contention. And both the district court and the Ninth Circuit seemingly agreed in *Topic* that an indirect injury was not protected by §1982.

Inasmuch as the court concludes that the plaintiffs lack standing to present their claim either under the 1866 Act or under the jurisdictional provisions of §3612, the motion for summary judgment in behalf of the defendants should be and hereby is granted and the cause is dismissed.

ENTER:

Bernard M. Decker
United States District Judge

DATED: September 23, 1976.

APPENDIX B

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Joseph Sam Perry

Cause No. 75 C 3589 Date September 29, 1976

Title of Cause

Village of Bellwood, etc., et al. vs. Hintze Realtors, et al.

This cause comes on upon defendants' motion for summary judgment. The court has read and considered said motion and the memoranda of the respective parties in support thereof and in opposition thereto and finds that said motion is well taken and should be granted for the reasons set forth in Judge Decker's thorough and scholarly Memorandum Opinion entered September 23, 1976 in *Village of Bellwood, etc., et al. vs. Gladstone Realtors, et al.*, case No. 75 C 3587, which opinion this court hereby adopts as its own. The court notes that the complaint in the aforesighted case is almost a verbatim duplicate of the complaint in the instant case, except of course for the names of the defendants, and that plaintiffs' brief in opposition to defendants' motion for summary judgment in the aforesighted case is, likewise, almost a verbatim duplicate of their brief in opposition to the instant motion for summary judgment, again except for the names of the defendants.

Accordingly, it is ORDERED that defendants' motion for summary judgment be and it hereby is granted, and that summary judgment be and it hereby is entered in favor of each defendant herein and against plaintiffs herein, with costs to be assessed against the plaintiffs.

J. S. Perry

APPENDIX C

In the
United States Court of Appeals
For the Seventh Circuit

No. 76-2193

VILLAGE OF BELLWOOD, *et al.*,

Plaintiffs-Appellants,

v.

GLADSTONE REALTORS, *et al.*,

Defendants-Appellees.

No. 77-1019

VILLAGE OF BELLWOOD, *et al.*,

Plaintiffs-Appellants,

v.

ROBERT A. HINTZE REALTORS, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois.

Nos. 75 C 3587 & 75 C 3589

Bernard M. Decker & J. Sam Perry, Judges.

ARGUED SEPTEMBER 16, 1977—DECIDED JANUARY 25, 1978

Before PELL, BAUER, and WOOD, *Circuit Judges.*

PELL, *Circuit Judge.* We have before us consolidated appeals from summary judgments granted the defendants

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in two lawsuits. In each suit, the same plaintiffs charged a different set of defendants (two real estate brokers and certain individual salespersons) with illegally "steering" prospective homebuyers to differing residential areas in the vicinity of Bellwood, Illinois, on the basis of their race, in violation of the Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1982. Judge Decker, being of the view that the plaintiffs in No. 76-2193 lacked standing to maintain the action, granted summary judgment and ordered the cause dismissed. In No. 77-1019, Judge Perry adopted Judge Decker's Memorandum Opinion and entered a similar judgment.

The individual plaintiffs in these cases are four white residents of Bellwood, and two black persons, one a resident of Bellwood, and one a resident of adjacent Maywood, Illinois. They asserted in their complaints that they "have been denied their right to select housing without regard to race and have been deprived of the social and professional benefits of living in an integrated society." The Village of Bellwood is also a plaintiff, alleging "injur[y] by having the housing market in such village wrongfully and illegally manipulated to the economic and social detriment of the citizens of such village." The other plaintiff is the Leadership Council for Metropolitan Open Communities, a non-profit corporation devoted to eliminating housing discrimination in the Chicago metropolitan area, which avers that the racial steering attacked here "hamper[s] and interfere[s]" with the Council's mission, and "cost[s] [it] money" to investigate and attempt to eliminate the practice.

Each of the individual plaintiffs in these cases assisted in the prelitigation investigation of defendants' practices. Their role as testers involved posing as prospective home-

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buyers in visits to real estate brokers. Couples of different races expressed similar preferences as to type, size, price range, and general location of houses in which they would be interested. The defendants allegedly steered couples making similar requests to houses in different areas, dependent upon the couple's race. All of the tester couples acted solely as investigators; none were making bona fide efforts to purchase homes in the affected area. This fact was deemed critical by both district judges, who held that only the direct victims of actual discriminatory acts had standing to maintain suit under 42 U.S.C. § 3612.

The fact that the individual plaintiffs acted as testers has produced some confusion in these cases, and, before addressing the standing question, it is necessary we clarify the matter. The defendants have argued, *e.g.*, that Congress did not intend to apply the Fair Housing Act to hypothetical cases or to create a remedy for testers, and that the only discrimination attacked produced no injury to anyone because the testers would not have bought a house no matter to what area they were steered. These arguments, at least in part, miss the point. It is true that plaintiffs' discovery admissions that no bona fide homeseekers are in the case negated the complaints' allegations that personal rights "to select housing without regard to race" are implicated here, but the other injuries alleged by the various plaintiffs can and must be assessed without dispositive reference to the role of the individual plaintiffs *qua* testers.

What the testers did was to generate evidence suggesting the perfectly permissible inference that the defendants have been engaging, as the complaints allege, in the *practice* of racial steering with all of the buyer prospects who come through their doors. Racial steering, by its nature, is a subtle form of discrimination that is difficult if not

impossible to prove otherwise than by comparing the areas to which homeseekers of different races are directed. The strength of the inference suggested by such a comparison is not affected by whether or not the "homeseeker" has a bona fide intent to purchase a home. To the degree defendants are seeking to saddle plaintiffs with the argument that testers *qua* testers have a cause of action, they have either misread the complaint or erected a straw man. To the degree the argument is that plaintiffs have failed to comply with Fed.R.Civ.P. 56(e) by showing specifically that racial steering was practiced on true homeseekers, it rings hollow in the light of defendants' refusal to date to provide any of the discovery sought by plaintiffs. Moreover, we think the tester evidence itself creates a triable fact issue.

Turning to the standing problems in the case, we assume, for the present purposes, that defendants have engaged in racial steering and that such a practice violates the federal statutes invoked here.¹ Inquiry into standing focuses on the litigant, not on the merits of his claim. The question is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Baker v. Carr*, 369 U.S. 186, 204 (1962)." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (footnote omitted; emphasis in original).

¹ See, e.g., in this regard, *Moore v. Townsend*, 525 F.2d 482, 486 (7th Cir. 1975); *Zuch v. Hussey*, 394 F.Supp. 1028, 1047 (E.D. Mich. 1975); *Fair Housing Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Service, Inc.*, 422 F. Supp. 1071, 1074-76 (D.N.J. 1976) (hereinafter *Bergen County*). Cf. *Johnson v. Jerry Pals Real Estate*, 485 F.2d 528 (7th Cir. 1973).

The constitutional limitations of the federal judicial power to cases and controversies engenders the first rule of standing: that the plaintiff must show actual or threatened injury to himself that is likely to be redressed or avoided by a favorable decision. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976); *Warth, supra*, 422 U.S. at 498, 505 (1975). As to the individual plaintiffs, there is no real doubt that the complaints satisfy this requirement.² *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), demonstrates that. Plaintiffs therein attacked the discriminatory rental practices of the large apartment complex in which they lived, asserting injury in their loss of social and professional benefits from living in an integrated community and in their stigmatization as residents of a "white ghetto." *Id.* at 208. The Supreme Court expressly found these averments to establish injury in fact. *Id.* at 209, 211. We reach the same conclusion about the virtually identical allegations of the individual plaintiffs in the cases which are now before us.³

Trafficante does not control the issue of standing of a municipal corporation to challenge illegal manipulation of its housing market to the "economic and social detriment"

² Neither district court, in fact, questioned the sufficiency of the complaints' allegations of injury in fact, and the defendants' only argument on this point is their assertion that the complaints fail to allege racial steering practiced on bona fide homeseekers, which argument we have rejected *supra*.

³ The Court's emphasis in *Trafficante* was on the "loss of important benefits from interracial associations," *id.* at 210, so we think it insignificant that the individual plaintiffs do not expressly allege stigmatization. Such an allegation, in any event, might well be thought to be implicit in the charge that plaintiffs have been denied the benefits of living in an integrated society.

of its citizens, although some guidance is provided by the Court's recognition that

[t]he person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the [Fair Housing] bill, "the whole community,"

Id. at 211 (citation omitted). That much is implicit in our determination that the individual plaintiffs here have alleged actual injury. We need not determine, however, whether or not the Village of Bellwood would have standing if the sole injury alleged was the deprivation to its citizens of the benefits of integrated living. Taking the complaints' allegations as true, and construing them liberally in a light favorable to the Village, *Warth, supra* at 501, it is apparent that specific concrete injury with a substantial nexus to the Village's status as a unit of government could be proved under these complaints. See *Flast v. Cohen*, 392 U.S. 83, 102 (1968). An area targeted as a "changing neighborhood" to which minority homeseekers may be steered could experience unnaturally rapid population turnover, with destabilized and possibly negative effects on property values and thus on its municipal tax base, and a conceivable increase in certain municipal problems to which a town such as Bellwood would have to commit resources in attacking them. See *Zuch v. Hussey, supra*, 394 F.Supp. 1028; cf. *Linmark Associates Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Barrick Realty, Incorporated v. City of Gary, Indiana*, 354 F.Supp. 126 (N.D. Ind. 1973), *aff'd*, 491 F.2d 161 (7th Cir. 1974).

By comparison, the actual injury alleged by the Leadership Council is rather slight. The complaints do not set out specific injury to Council members which, arguably, the Council might be accorded standing to assert. The sole

allegations are that racial steering interferes with the Council's mission and costs it funds to attack. But the Council's interest in open housing matters and its asserted commitment to effectuating that interest, albeit commendable, do not substitute for the concrete injury constitutionally required to invoke the jurisdiction of the federal courts. See *Simon, supra*, 426 U.S. at 39-40; *Warth, supra*, 422 U.S. at 511-17; *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972); *Mulqueeny v. National Commission on the Observance of International Women's Year, 1975*, 549 F.2d 1115, 1120-22 (7th Cir. 1977). The alleged dollar cost to the Council of attacking defendants' alleged practices is simply "concomitant to [its] keen concern" about open housing issues, and does not present independently cognizable injury. *Id.* at 1121. For these reasons, we affirm the judgments of the district courts insofar as they dismissed the Council from the action for lack of standing.

Once it is determined that litigants have alleged actual injury, standing inquiry focuses on whether the rights they assert are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). We think that the individual plaintiffs and the Village of Bellwood present claims at least arguably within the ambit of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*⁴

⁴As we stated earlier, plaintiffs also invoke 42 U.S.C. § 1982. Because § 1982 is set up simply as another theory to justify relief on the same facts to which application of the Fair Housing Act is sought, and there is only one count in each of the complaints before us, we have no need to consider standing under § 1982 separately. See *Trafficante, supra*, 409 U.S. at 209 n.8.

Once again, *Trafficante*, *supra*, provides substantial guidance. In affirming the standing of two individuals who asserted precisely the same injury as do the individual plaintiffs here, the Court stated that “the reach of the . . . law was to replace the ghettos ‘by truly integrated and balanced living patterns.’” 409 U.S. at 211 (citation omitted). Congress’ concern for those who suffer indirectly from discriminatory acts was stressed, *id.* at 210, 211, as was the fact that “[c]omplaints by private persons are the primary method of obtaining compliance with the Act.” *Id.* at 209. Quoting a Third Circuit opinion⁵ which had found in the Civil Rights Act of 1964 “a congressional intention to define standing as broadly as is permitted by Article III of the Constitution,” the Court expressly “reach[ed] the same conclusion” “[w]ith respect to suits brought under the 1968 Act.” *Id.* Using this reasoning, we have no difficulty finding that both the Village and the individual plaintiffs here are at least arguably intended beneficiaries of the substantive provisions of the Act.

Of course, if the procedural provisions of the Act which authorize private suits somehow exclude these plaintiffs or condition their access to federal court on meeting requirements which they have not met, the judgments of the district courts would have to be affirmed nonetheless. The possibility that this is so arises because there are two provisions in the Fair Housing Act authorizing private enforcement. The only plaintiffs explicitly discussed in *Trafficante* brought suit under 42 U.S.C. § 3610, which provides that “[a]ny person who claims to have been injured by a discriminatory housing practice [defined in 42 U.S.C. §

⁵ *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971).

3602(f) as a violation of sections 3604-3606 of the title] . . . (hereafter ‘person aggrieved’)” may file a complaint with the Secretary of Housing and Urban Development for investigation and conciliation, failing the satisfactory resolution of which he or she may commence a civil action in federal court. The plaintiffs here, never having complained to the Secretary, bring suit under 42 U.S.C. § 3612 (a), which provides in part that “[t]he rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy . . .”

The judgments under review are premised on the theory that *Trafficante* establishes broad standing only for suits under § 3610 and that the preferential access to federal courts contained in § 3612 should be limited to direct victims of discriminatory acts. This theory has been adopted in the Ninth Circuit, *TOPIC v. Circle Realty*, 532 F.2d 1273 (9th Cir. 1976), *cert. denied*, 429 U.S. 859, and is not without some plausibility. Although there were intervening plaintiffs in *Trafficante* who had not complained to the Secretary and whose standing thus depended on § 3612, *Trafficante v. Metropolitan Life Insurance Company*, 446 F.2d 1158, 1161 n.5 (9th Cir. 1971), the Supreme Court made no express reference to these plaintiffs. We cannot assume that the Court necessarily adjudicated the standing of all the plaintiffs in the case. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 n.9 (1977). Moreover, the Court in *Trafficante* placed some emphasis on the “person aggrieved” language of § 3610, which language does not appear in § 3612.

These factors make it “impossible to tell with certainty” whether *Trafficante* was meant to control cases arising

under § 3612, *Bergen County*, *supra*, 422 F.Supp. at 1082, even though the *Trafficante* opinion cites and quotes both § 3612 and § 3610 without distinguishing between the two and some of the opinion's language, quoted above, would appear to cover all suits brought under the Act.⁶ Assuming, then, that *Trafficante* does not flatly *control* this case, we have nonetheless reached the conclusion that *TOPIC* was wrongly decided and the district courts erred in relying on it and dismissing these actions.⁷

Whatever may be the pertinence of *Trafficante*'s holding for these lawsuits, its thrust and rationale plainly suggest that the individual plaintiffs and the Village of Bellwood have standing. As we have noted, the Court emphasized the Congressional policy of protecting all those injured by discriminatory acts and practices, and stressed the critical importance of "private attorneys general in vindicating a policy that Congress considered to be of the highest priority." 409 U.S. at 211. This reasoning would surely apply here, unless there were some reason to think that Congress intended §§ 3610 and 3612 to serve different types of private litigants.

The Ninth Circuit in *TOPIC* purported to find such a reason in the very duality of the statutory scheme. The court reasoned that the "slower, less adversary context

⁶ Also, the Court expressly reserved decision on the *Trafficante* plaintiffs' standing under 42 U.S.C. § 1982, 409 U.S. at 209 n.8, but made no such reservation as to issues pertaining to § 3612.

⁷ This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing *en banc* on the position taken in the opinion rejecting the approach of the Ninth Circuit in *TOPIC*. Judge Tone did not participate in the consideration.

of administrative reconciliation and mediation" was a fitting route to relief for the broad class of those injured under *Trafficante*'s standards while the direct "preferential access" to the courts set out in § 3612 must have been intended for those who needed judicial relief most, *i.e.*, those directly injured. 532 F.2d at 1276. The *TOPIC* opinion provides no evidence at all that such was in fact the contemplation of Congress, nor have the district courts or the defendants herein offered any.

Indeed, the only legislative history cited to us is inconsistent with the notion of § 3610 as a "slower," less preferred route to relief for those less needy of immediate redress. Open housing legislation was before the Congress as early as 1966. When the possibility of an administrative remedy was first proposed, it was supported on the grounds that it would provide quicker, less expensive, and fairer relief. 112 CONG. REC. 18402, 18405, 18409 (1966) (remarks of Representative Conyers); *id.* at 18409 (remarks of Representative Vivian). At least one Congressman opposed the proposal because it would duplicate relief under the direct judicial method. *Id.* at 18401, 18405 (remarks of Representative McClory).

During House debates in 1968 on the legislation ultimately adopted, Representative Celler, the bill's floor manager, explained the various remedial provisions as simply alternatives, drawing no distinctions between them. 114 CONG. REC. 9560 (1968). Representative Ford introduced an analysis prepared by the staff of the Judiciary Committee which described § 3612 as "apparently an alternative to the conciliation-then-litigation approach [contained in § 3610]. . . ." *Id.* at 9612.

In a variety of contexts, federal courts have treated §§ 3610 and 3612 as independent alternative remedies.

See, e.g., Marr v. Rife, 503 F.2d 735, 739 (6th Cir. 1974); *Miller v. Poretsky*, 409 F.Supp. 837, 838 (D.D.C. 1976); *Young v. AAA Realty Company of Greensboro, Inc.*, 350 F.Supp. 1382, 1384-85 (M.D.N.C. 1972); *Crim v. Glover*, 338 F.Supp. 823, 825 (S.D. Ohio 1972); *Johnson v. Decker*, 333 F.Supp. 88, 90-92 (N.D. Cal. 1971); *Brown v. Lo Duca*, 307 F.Supp. 102 (E.D. Wis. 1969). We reach the same conclusion here, and hold that there is no difference between the class of plaintiffs with standing to invoke § 3610 and the class with standing to invoke § 3612. *Accord, Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.*, 429 F.Supp. 486 (E.D.N.Y. 1977); *Bergen County, supra*; and see *Village of Park Forest v. Fairfax Realty*, P-H Eq. Opp. Hsing. Rptr. ¶ 13,699 (N.D. Ill. 1975), and P-H. Eq. Opp. Hsing. Rptr. ¶ 13,784 (N.D. Ill. 1976); *Heights Community Congress v. Rosenblatt Realty, Inc.*, 73 F.R.D. 1 (N.D. Ohio 1975). Our decision is supported by the fact that HUD, which has significant responsibilities in the administration of the Fair Housing Act, apparently makes no distinction between the two classes. 24 C.F.R. 105.16 (1976). See *Trafficante, supra*, 409 U.S. at 210.

It may to some degree seem to offend a judicial penchant for consistency to say that Congress has, in the same act, established an administrative remedy and authorized plaintiffs, at their discretion, to bypass it. The answers are, first, that such a judicial penchant does not give a court the license to write into a statute a distinction Congress never intended, and, second, that there is sense in such a scheme. The administrative provisions of § 3610 merely make available the good offices of HUD for conciliation and settlement purposes. Nothing akin to adjudication is to be undertaken, and HUD lacks the power to provide the

complainant with any coercive relief. Conciliation through HUD may well be productive in a given case, notwithstanding the toothless nature of the remedy, but it is by no means unreasonable to allow the complainant, who may well have had direct experience with the alleged discriminator, to make that choice. That, in any event, is the course Congress has chosen.

For the reasons set out herein, we decide that the individual plaintiffs and the Village of Bellwood⁸ have standing to litigate these lawsuits. The judgments of the district courts are to that extent reversed, and affirmed insofar as they dismissed out the Leadership Council as a plaintiff, and the cases are remanded for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

⁸ In a single sentence at oral argument, counsel for defendants advanced the argument, not mentioned in their brief, that the Village lacks standing because it is not a "person" as defined in 42 U.S.C. § 3602(d). That section does not limit "person" to natural persons, but sets out a broad range of organizations, including "corporations," within the definition. The Village is a municipal corporation, and we see no reason, or at least defendants have shown none, to construe § 3602(d) to exclude that type of corporation.